SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1912

JEFF EARL CARVER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet been reported. A copy of the opinion is attached as an Appendix to the Petition for Writ of Certiorari at page 1a to page 15a.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition, although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner presents two questions which he asserts should be reviewed by this Court. These questions as asserted by Petitioner are as follows:

1. Whether the prior recorded testimony of the absent witnesses Tue and Rogers was properly admitted in evidence under the exception to the Sixth Amendment confrontation requirement recognized in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

   A. Whether testimony of absent and unavailable witnesses, recorded at a previous juvenile jurisdiction certification hearing under Tex.Rev.Stat.Ann. Art. 2338-1, Sec. 6, (wherein guilt or innocence and self-defense are not relevant issues) comes within the exception to the confrontation requirement of the Sixth Amendment, which allows the admission in evidence of testimony recorded in a prior trial of the same defendant.

B. Whether the state made a good faith effort to produce the witnesses at trial, so that the witnesses were "unavailable", within the exception to the confrontation requirement of the Sixth Amendment if the armed services would permit the witnesses to appear but would not advance funds, the state law does not authorize the state or county to advance funds to out-of-state witnesses prior to the time of their appearance, and the state prosecutorial authority knowing of these matters, fails to request the armed services to direct the witnesses to appear.

2. Whether the Court of Criminal Appeals applied the correct rule of decision in determining "harmless error" in this case, specifically, whether the proper rule of decision is that articulated in *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), or whether *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) altered the rule for determining the presence or absence of "harmless error".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment and the Sixth Amendment of the Constitution of the United States are involved herein, as well as Texas

Revised Civil Statutes, Article 2338-1, Section 6. The Petition at page 4 and Appendix D sets out these pronouncements.

STATEMENT OF THE CASE

During the morning of September 9, 1971, Jeff Earl Carver, Petitioner herein, then a fifteen (15) year old male student at Dunbar High School, Lubbock, Texas and Willie Collier, also a student at that school, had a confrontation over Collier's demand of a cigarette. During the confrontation, Carver apparently was scratched on the arm by tool used to open cardboard boxes which was held by Collier. Carver did not seek, nor did he receive, any medical treatment for this minor injury. At noon, Carver left the school with two acquaintances. These three went to Jeff Carver's home where Carver went in and secured a pistol and ammunition. The boys then went to eat lunch at a drive-in restaurant. Having eaten, the boys returned to Dunbar High School where Jeff Carver entered the school with the admitted intent of finding Willie Collier. Failing to find Collier, Carver went back outside the school building to wait for the next class change which was to occur in fifty-five (55) minutes. At approximately 2:40 P.M. on the afternoon of September 9, 1971, Jeff Carver entered Dunbar High School for the second time armed with the murder weapon for the purpose of finding Willie Collier. Upon finding Collier, Carver walked up behind him, tapped him on the shoulder with the loaded pistol, and when

Collier turned to face him, shot him once at point-blank range. The wound inflicted by Jeff Carver upon Willie Collier resulted in Collier's death minutes later.

On October 15, 1971, the 137th District Court of Lubbock County, Texas, sitting as a Juvenile Court, after a hearing on jurisdiction where live witnesses were heard, including John Tue and Randall Rogers, entered an order waiving its jurisdiction over Petitioner; and he was transferred to the 99th District Court of Lubbock County, Texas, for criminal proceedings. An indictment was returned by the Grand Jury on January 11, 1972, charging the Petitioner with the offense of Murder with Malice. A trial before jury was had on October 30, 1972, in the 99th District Court. The jury returned a verdict of guilty of the offense of Murder Without Malice, and punishment was assessed at five (5) years confinement in the Texas Department of Corrections.

An appeal from the jury verdict in the 99th District Court, Lubbock County, Texas, was perfected to the Court of Criminal Appeals of Texas. The Court of Criminal Appeals affirmed the decision reached in the trial court and issued an opinion so stating on May 1, 1974.

ARGUMENT AND AUTHORITIES

I.

THE PRIOR RECORDED TESTIMONY OF THE ABSENT WITNESSES TUE AND ROGERS WAS

PROPERLY ADMITTED IN EVIDENCE UNDER THE EXCEPTION TO THE SIXTH AMENDMENT CONFRONTATION REQUIREMENT.

The trial court was entirely correct in admitting the prior recorded testimony of Tue and Rogers. As the Court of Criminal Appeals very correctly stated in their opinion in *Carver v. State*, the law recognized in Texas, and not in conflict with provisions of the Constitution of the United States, is that when a witness has once testified in a case, on a preliminary hearing or on a former trial, and the accused was present and had the opportunity to cross-examine the witness, and such witness has since died, or resides out of state, or has removed beyond the limits of the State, or cannot attend the trial by reason of age or bodily infirmity, or has been prevented from attending court through the act or agency of the other party, his testimony may be reproduced in a subsequent trial of the same case if the proper predicate be laid for its admission. Article 39.01, Vernon's Ann. C.C.P. Petitioner asserts at page 8 of his Petition before this Court that because the hearing at which the testimony was recorded was a juvenile jurisdictional hearing and not an examining trial, the testimony should not have been admitted. Respondent asserts that this is little more than a question of semantics and that the juvenile certification process (as set out in the Petition, page 18a to page 21a) can certainly be considered no less than a preliminary hearing and thus in compliance with Article 39.01, Vernon's Ann. C.C.P., with regard to prior recorded testimony.

In considering the area of the Sixth Amendment right to confrontation, one must look carefully at its development to fully understand what protection is afforded. It has long been held, as Petitioner agrees, that the admission of prior testimony of an unavailable witness does not, in and of itself, violate the confrontation clause of the United States Constitution. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337 (1895). It cannot be disputed that an accused in a criminal case must have the right to confront and cross-examine witnesses against him. *Pointer v. State,* 380 U.S. 400, 85 S. Ct. 1065 (1965). It is important to realize, however, that the development of the law in this area has come about in an effort to protect defendants in criminal cases from having to face *ex parte* evidence in lieu of a personal examination and cross-examination. *Barber v. Page,* 390 U.S. 711, 88 S.Ct. 1318 (1968), *Green v. California,* 399 U.S. 163, 90 S.Ct. 1930 (1970).

Petitioner bases a great deal of emphasis on this Court's decision in *Barber v. Page, supra*, and Respondent asserts that a close reading of that case clearly shows why the trial court's action herein should be upheld. This Court made it abundantly clear in that case that the state authorities made no effort to obtain the personal appearance of a missing witness. *Barber v. Page, supra* at 1322. The testimony of Tue and Rogers would not be excluded by this Court's decision in *Barber v. Page* because the State did make a good faith effort to secure their testimony at Petitioner's trial. The evi-

dence shows that the witness Tue was in the United States Marine Corps stationed off the coast of Viet Nam (SF 61) and that the witness Rogers was in the United States Marine Corps stationed in North Carolina (SF 63). The State introduced evidence at trial of an application for out-of-state witnesses for PFC Rogers and PFC Tue. (SF 50). Also, Mr. Blair Cherry, District Attorney of the 72nd Judicial District of Texas, attempted to comply with the instructions given him by the commandant's office of the United States Marine Corps. (SF 64). The Judge Advocate's office in Washington, D.C., informed Mr. Cherry that he would have to advance money in order for the witnesses to travel to Lubbock. (SF 67).

While the Marine Corps insisted the money to finance these two witnesses' trip to Lubbock, Texas would have to be advanced, the laws of the State of Texas did not allow the state to advance money to subpoenaed out-of-state witnesses prior to their appearance. Opinions of the Attorney General, Nos. C-720 and M-863. In an opinion written by the Honorable Crawford C. Martin, then the Attorney General of Texas, in May, 1971, this law was interpreted as follows:

> Article 24.28, Texas Code of Criminal Procedure, contains no authorization permitting or directing the advancing of County funds to a subpoenaed out-of-state witness while such witness is waiting to be paid by the State. Accordingly, Counties are not permitted to make such advances to such witnesses. Such witnesses are to receive compensation solely from the State. Op. Atty. Gen., No. 863, p. 3.

A later opinion, written in January, 1972, made it clear that mileage and fees were to be paid witnesses obeying the summons. Opinion of the Attorney General, M-1038. Contrary to Petitioner's contention, the record reflects that Mr. Cherry did everything possible within the laws of the State to secure these witnesses for trial and made a good faith effort to secure their appearance. The District Attorney did not make an independent decision that the armed forces would not cooperate and therefore there was no need to pursue the matter. He made the request of the Marine Corps and was refused. While Petitioner contends in his Petition on page 13 that the language in *Barber v. Page* concerning the possibility of a refusal not being the equivalent of asking and receiving a rebuff is controlling in this case, the Respondent asserts that the facts herein make this portion of *Barber v. Page* wholly inapplicable.

The record reflects that the prosecutor in this case laid the proper predicate for the introduction of the two witnesses prior recorded testimony. The only real question remaining then is whether the prior recorded testimony used at trial was subject to cross-examination. Petitioner contends that this prior recorded testimony does not satisfy the requirements of the exception to the confrontation requirement of the Sixth Amendment because of a lack of opportunity for cross-examination at the certification hearing. Respondent would urge that Petitioner bases his entire argument in this area on cases where there was no cross-examination. Here, the

attorney representing Petitioner pursued vigorous cross-examination in what amounted to an examining trial. See *Garza v. State*, 469 S.W.2d 169 (1971). At this hearing, Petitioner was represented by one of the two lawyers that later represented him at trial, and the testimony of Tue and Rogers was taken under oath. As previously mentioned, the attorney for Petitioner had the opportunity and utilized the opportunity to cross-examine both witnesses. (SF 132-163, 178-200). Petitioner should not now be heard to say that even though cross-examination was allowed, it was not as thorough as it might have been because of some subjective understanding of his attorney. Respondent would assert that the proper test to be used should be whether or not there was an opportunity for cross-examination rather than the use made of that opportunity. As the Tenth Circuit has noted:

> The extent of cross-examination, whether at a preliminary hearing or at trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right. *United States v. Allen*, 409 F.2d 611, 613 (10th Cir. 1969).

Respondent reasserts that this prior recorded testimony was admissable, and no error can be attributed to the trial court's action in admitting it.

II.

THE COURT OF CRIMINAL APPEALS OF TEXAS CORRECTLY DECIDED THAT ERROR,

IF ANY, IN THE ADMISSION OF THE PRIOR RECORDED TESTIMONY OF TUE AND ROGERS WAS HARMLESS BEYOND A REASONABLE DOUBT.

The convication in this case certainly does not turn on circumstantial evidence as Petitioner seems to imply. There were many people present in that busy school corridor at 2:40 P.M. on the afternoon of September 9, 1971. A number of witnesses described the events just prior to and after the shooting, and several were eyewitnesses. The facts surrounding the shooting at issue here, as developed at trial, show that Petitioner went to his home, got a pistol, ate lunch at a drive-in restaurant, returned to school and after some delay, shot Willie Collier as Collier backed away from him. The testimony of Petitioner himself corroborates the testimony of the missing witnesses. Nevertheless, the testimony of three other witnesses, Donnell Hooper, Pamela Knighten and Danny Webb, specifically negates any self defense on the part of Petitioner in this shooting. There are, of course, numerous other witnesses testifying about Jeff Carver's having shot Collier, which Petitioner does not deny, and to a lesser degree, about the fact that Collier was not any threat to Jeff Carver in this incident. The evidence is overwhelming that the deceased was making every effort to separate himself from the presence of Jeff Carver and the weapon he carried.

The gravamen of Petitioner's contention concerning "harmless error" seems to be that the wrong test was used by the Court of Criminal Appeals in deciding this issue. Petitioner seems to urge that the proper test for deciding "harmless error" is found in *Fahy v. Connecticut*, 375 U.S. 89, 84 S.Ct. 229 (1963); and no other test or decision is applicable. Respondent asserts that *Fahy v. Connecticut* must certainly be viewed as limited to its own facts in light of the body of law produced in this Court since that decision. *Fahy v. Connecticut* has of course been interpreted to mean that all trial errors which violate the Constitution do not automatically call for reversal. *Chapman v. California*, 386 U.S. 19, 23, 87 S.Ct. 824, 828 (1967). In adopting the *Chapman* decision, this Court has written:

> We do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we can say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed. *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728-29 (1969).

The evidence against the Petitioner in the instant case is, as in *Harrington*, so overwhelming that, regardless of the taint on the admission of the prior recorded testimony, the admission of that evidence was "harmless error" beyond a reasonable doubt.

CONCLUSION

For the reasons above stated, Respondent asserts that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the attorneys for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Clifford W. Brown, Brown & Harding, 1601 Broadway, Lubbock, Texas 79401 and Mr. Thomas L. Clinton, Court Place, Lubbock, Texas 79401 on this the _____ day of July, 1974.

GILBERT J. PENA
Assistant Attorney General